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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES BRETZ,
Petitioner,

versus

THE STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of the
State of Louisiana

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Once error has been established and admitted to exist by the court reviewing a criminal conviction, can a defendant constitutionally be required to carry the burden of "thoroughly convincing" the appeals court that the jury was influenced by the error and that the error contributed to the verdict, or, in light of *Chapman v. California* should the burden be on the state, and if so what standard of proof should the state be required to meet in showing that errors in the trial below were not so prejudicial as to constitute reversible error?

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PETITION FOR CERTIORARI

The petitioner, Charles Bretz, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Louisiana rendered in these proceedings on January 26, 1981, rehearing denied March 2, 1981.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 394 So.2d 245 (1981). That opinion appears at Appendix A., *infra*. The denial of the petition for rehearing took place on March 2, 1981.

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on January 26, 1981. The judgment of denial of the petition for rehearing was entered on March 2, 1981.

The jurisdiction of this Court is invoked under 28 USC §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const., Amend. XIV, Section I.

Article 921 Matters are not grounds for reversal

A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused.

Louisiana Code of Criminal Procedure
Article 921.

STATEMENT OF THE CASE

On June 14, 1979, defendant Charles Bretz was charged by a grand jury indictment with attempted first degree murder. Following the trial, a twelve member jury returned a ten to two verdict of guilty of attempted manslaughter. Defendant's motion for a new trial was denied, and he was sentenced to three years at hard labor. On appeal to the Louisiana Supreme Court, the defendant argued ten assignments of error. The assignments of error were found to be without merit and the conviction was affirmed, with two justices dissenting, on January 26, 1981. Rehearing of the case was denied on March 2, 1981, whereupon petitioner applied for and was granted a stay of execution of sentence for 60 (sixty) days pending application for writs of certiorari to this Court.

It is the standard and burden of proof with regard to reversible error enunciated by the Supreme Court of

Louisiana which defendant desires to challenge in this Court.

STATEMENT OF FACTS

The following is a description of the incidents which led to the defendant's indictment for attempted first degree murder and his subsequent conviction on the reduced charge of attempted manslaughter.

On April 30, 1979 the defendant, a 22-year-old off-duty New Orleans Police officer, was driving his girl-friend home. He believed he was being followed, and drove around instead of going directly to her house. The car still followed and defendant pulled into a donut shop in hope of finding police officers on coffee break or to use the phone to call for help. The car following, containing the eventual victim, pulled in also. When the driver got out of his car in the parking lot the defendant backed out. The victim got back in his car and backed out also. Defendant pulled back in, whereupon the victim pulled his car up in such a way as to block defendant's. He pointed a shotgun out of his car window at defendant for several seconds, and then drove off at a high rate of speed. Defendant entered the donut shop to call his platoon commander. Defendant then saw the driver of the car approach the shop on foot. They met outside. Defendant attempted to arrest the victim for aggravated assault, but could not restrain him. A chase on foot ensued. The victim ran into a bar and behind

the counter, where he started rummaging in the shelves underneath for what defendant thought was a gun. When the victim turned back around, the defendant, believing he was armed, shot him three times. A handgun was subsequently found under some paper bags beneath the cash register.

The victim has a completely different version of the events that transpired. He had stopped for a beer at the bar in question. He thought he had parked his car illegally, so he went outside to move it. After doing so, he walked back across the donut shop parking lot, where he was confronted by the defendant, who used a racial epithet and tried to restrain him. The victim denies that the defendant identified himself as a police officer. He started running back to the bar as the defendant's efforts to restrain him became more forceful. He stated that he went behind the bar in order to have the bartender between himself and the defendant. The victim denied rummaging behind the bar for a gun.

At trial, the prosecution addressed a series of statements to the jury which the defense objected to as improper. Specifically at issue here are Assignments of Error Numbers 6-10 argued on appeal to the Louisiana Supreme Court. See Appendix *A, infra,* for the text of that opinion. In Assignments of Error 6-10 the defendant contended that the trial court erred in allowing the state to argue from facts outside the evidence and asking improper questions about the defendant's

marital status when he was out with another woman. *State of Louisiana v. Charles Bretz*, page 13a. The Supreme Court of Louisiana found some of the questions and arguments to be improper but ruled that they did not constitute reversible error. The Court announced the standard of reversible error as error that would "clearly influence the jury to the prejudice of the defendant" (page 13a). Throughout the opinion the court emphasized that there had to be *"a clear showing by the defendant* that the jury was prejudiced by the questions." (page 15a). Defendant's assignments of error under that standard were found to be without merit and his conviction was affirmed. Rehearing in his case was denied on March 2, 1981.

REASONS FOR GRANTING THE WRIT

No. 1

All states must have a minimum constitutionally acceptable standard for determining reversible error. Widely divergent interpretations of state reversible error statutes, as is illustrated by this case, result in a violation of both the guarantee of fundamental fairness embodied in the Due Process Clause and on a larger scale, the Equal Protection clause of the Fourteenth Amendment.

In the intervening fifteen years since *Chapman v. California*, 386 U.S. 18, (1967) was decided, the states are

drifting away from the Court's mandate. The Louisiana Supreme Court's opinion in the instant case is directly in conflict with the holding in *Chapman*. It is time for the Court to enunciate standards to guide the states in re-establishing constitutional standards for determining reversible error.

INTRODUCTION

The following arguments will deal with improper closing arguments by government counsel, and with the Louisiana Supreme Court's interpretation of the Louisiana reversible error statute, Article 921 of the Code of Criminal Procedure. Petitioner recognizes that the United States Supreme Court cannot review every case where it is claimed that the prosecutor made an improper remark. However petitioner suggests that the issue is much more complex than simple prosecutorial misconduct.

In the appeal of petitioner's case, the Louisiana Supreme Court acknowledged that the prosecutor's remarks complained of were unwarranted and in some cases clearly improper. It then went on to say that they did not constitute reversible error because the defendant had not met his burden of clearly convincing the court that the errors prejudiced the jury. Petitioner respectfully maintains that the Louisiana Supreme Court opinion in the instant case expresses legal conclusions that are clearly inconsistent with the con-

stitutional requirements as stated by the United States Supreme Court, notably in *Kotteakos v. United States*, 328 U.S. 750, (1946). The case also presents broad and far-reaching 14th Amendment issues of due process and equal protection. The Louisiana statute, as interpreted, places an unreasonable burden of proof on the defendant, and in light of the outcome of this case singles out criminal defendants to meet this heavy burden. The Supreme Court should grant certiorari to review these issues and to reassert the guidelines it established 15 years ago in *Chapman v. California*.

ARGUMENT

In considering the prosecutor's comments at trial, the Louisiana Supreme Court stated in the majority opinion:

> Before a verdict will be overturned on the basis of improper argument, this Court must be *thoroughly convinced* that the jury was influenced by the remarks and they contributed to the verdict. *State v. Bretz*, page 7a. (Emphasis supplied).

The Louisiana court went on to say that while it "generally" found the arguments to be permissible, it continued, ". . . even if they appear improper, we do not believe they *clearly* influenced the jury to the defendant's prejudice," *Ibid.* Regarding the prosecutor's argu-

ment about the number of facts he had seen presented in other cases, the majority stated: "Although the prosecutors observation concerning his sightseeing experience was improper, it was also innocuous and we fail to see how this comment could have influenced the jury to the defendant's prejudice." *Ibid.*, at p. 8a. In concluding its review of all of the remarks, "singularly or as a whole" the court found that they ". . . did not *clearly* influence the jury to the prejudice of the defendant." *Ibid.* at p. 13a. (Emphasis supplied).

The defense respectfully suggests that the court's requirement that errors must "clearly" influence the jury and that it ". . . must be *thoroughly convinced* that the jury was influenced by the remarks and that they contributed to the verdict. . . ." is an improper standard under the constitutional requirements set down by the United States Supreme Court and the legislative standards set forth in Article 921 of the Louisiana Code of Criminal Procedure.

This Court set down the constitutional standards for evaluating the degree of "prejudice" that is required for reversal in the case of *Kotteakos v. United States, supra.* While it is doubtful that a state legislature could set a lesser constitutional standard even if it desired to do so, that issue need not be addressed because the Comments under Article 921 clearly state that our "harmless error" rule is designed to achieve the exact same standard as *Kotteakos.* C.Cr.P. Art. 921, comment (c).

It can be seen from the *Kotteakos* case and Article 921 that the standard for evaluating errors is opposite from that which the Court stated in the instant case. In other words, the Court is putting the burden on the defendant to "thoroughly convince" it that the error adversely affected the jury's verdict. That is an impossible burden. Article 921 says that there should be a reversal if, ". . . after an examination of the entire record, it appears that the error complained of has *probably* resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right." The language of this Court in the *Kotteakos* case, which was quoted in the Comments under Article 921, states, ". . . if, when all is said and done, the court is *sure that the error did not influence the jury,* or had but very slight effect, the verdict and judgement should stand, except perhaps where the departure is from a constitutional norm or a specific comment of Congress. . . ." *Kotteakos v. United States, supra,* at 764. (Emphasis supplied). Regarding the above mentioned quote, the Comment under Article 921 goes on to say, "[i]n essence, this is exactly what the Louisiana Law accomplishes." C.Cr.P. Art. 921, comment (c). (See Appendix B for text).

In evaluating whether there was prejudice to "substantial rights" this Court stated that:

> ". . . if one cannot say, with fair assurance, after pondering all that happened without

> stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one if left in grave doubt, the conviction cannot stand." *Kotteakos v. United States, supra,* at 763.

This is not merely a semantical distinction or a question of emphasis. The majority opinion of the Louisiana Supreme Court clearly places a much higher standard for evaluating the prejudicial effect of error than is constitutionally or legislatively permissible.

Additionally *Kotteakos* and later cases clearly stress the fact that is not the defendant who carries the burden of meeting the standard of proof enunciated in *Kotteakos,* but rather the state. In the 1967 case of *Chapman v. California, supra,* the Court held that:

> An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy,* be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on

> someone other than the person prejudiced by it a burden to show it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. *Chapman, supra* at 23, 24.

The Court in *Chapman* then went on to strengthen the standard of proof enunciated in *Kotteakos, supra,* and a later harmless error case, *Fahy v. Connecticut,* 375 U.S. 85, (1963), by holding that, "There is little, if any, difference between our statement in *Fahy v. Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman, supra,* at 24.

An analysis of the standards and burden of proof in the above-cited cases as contrasted with the outcome of the *State of Louisiana v. Charles Bretz* reveals an obvious conflict with the above-cited United States Supreme Court mandates.

The constitutional implications are equally evident. The unreasonable standard of proof which is thrust upon the defendant by Louisiana's interpretation of its

reversible error statute violates the Due Process Clause of the Fourteenth Amendment. What the Court held in *Chapman, supra,* holds equally true today:

> With fairness to the constitutional union of the states, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. *Chapman, supra,* at 21.

Equally troubling is the recognition that while states are accorded some flexibility in fashioning their reversible error statutes, as *Chapman, supra,* acknowledged, there may be a widening gap between the minimum constitutional standards of proof as set out by this Court, and actual state practices. Louisiana is one glaring example, as is evidenced by the Louisiana Supreme Court's failure in the present case to follow the *Kotteakos* standard mandated by the Louisiana legislature in Article 921 of the Code of Criminal Procedure.

The evidence in the case was very close. That fact is substantiated by the record and by the jury's compromise verdict. When the scales are as delicately balanced as a review of the "entire proceedings" will indicate they were, the Court should reverse when the heavy thumb of the prosecutor is placed on the side indicating guilt. Requirements that the Court be "thoroughly convinced" that the jury was affected by the

errors should not be used to support and encourage improper tactics by the prosecution. Throughout these proceedings Charles Bretz has never suggested or requested that he be given special treatment because his actions took place while he was performing his duties as a police officer. However, while he is not entitled to any more consideration than any other defendant, he is not entitled to any less. The issues which he raised on appeal were important and substantial.

CONCLUSION

The opinion of the Louisiana Supreme Court is in direct conflict with the earlier opinions by this Court. Therefore petitioner Charles Bretz requests that the United States Supreme Court grant certiorari so that it may thoroughly consider the appropriate standards for evaluating the prejudicial effect of admitted errors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been served on the respondent by placing copies of same in the United States mail, postage prepaid, addressed to The Honorable Harry Connick, District Attorney, 2700 Tulane Avenue, New Orleans, Louisiana and The Honorable William Guste, Attorney General, 234 Loyola Avenue, New Orleans, Louisiana.

This ____ day of April, 1981, New Orleans, Louisiana.

JULIAN R. MURRAY, JR.

APPENDIX A

STATE of Louisiana

v.

Charles BRETZ.

No. 66935.

Supreme Court of Louisiana.

Jan. 26, 1981.

Rehearing Denied March 2, 1981.

BLANCHE, Justice.

Defendant, Charles Bretz, was charged by a grand jury indictment with attempted first degree murder. Following a trial, the twelve member jury returned a verdict of guilty of attempted manslaughter. Defendant's motion for a new trial was denied, and he was sentenced to three years at hard labor. On appeal, the defendant argues ten assignments of error.

On April 30, 1979 at approximately 9:45 p.m., the defendant, a 22 year old off-duty New Orleans Police offi-

cer, was driving his girlfriend home. What transpired that night is difficult to discern as two completely different stories were presented to the jury.

According to the defendant, he believed he was being followed by another vehicle, the driver of which was to become the ultimate victim. Since the defendant had been involved in a prior off-duty arrest, he felt some concern that a participant in this incident might be following him. To check this theory, the defendant drove an erratic pattern instead of taking his girlfriend directly home, and concluded that he was being followed. Defendant then drove to a Tastee Donut Shop in the hope of finding some other police officers there taking a break, or to use the telephone to call for help.

The vehicle following him pulled alongside the defendant's car in the parking lot. Defendant observed the driver of that car and made a mental note of the car's license plate number. When the driver got out of his car, the defendant started to back out. Seeing this, the other driver hurriedly got into his car and backed out also. To avoid an automobile chase, the defendant put his car back in its original parking space, whereupon the other driver positioned his car so the defendant was blocked in.

The defendant looked over his shoulder at the driver and saw a single-barrelled shotgun being pointed at him. His girlfriend likewise said she saw the shotgun

and immediately ducked down on the car seat. The defendant identified the victim as the driver of the car who was pointing a shotgun at him. He estimated the driver pointed the shotgun at him for approximately 8½ seconds, and then drove off at a high rate of speed.

Defendant and his girlfriend then went into the Tastee Donut Shop where he wrote down the car's license plate number on a napkin and called his platoon commander, Lieutenant Alberts, and told him what was happening. At that time, Lieutenant Alberts told the defendant to stay in the donut shop until he arrived on the scene.

Soon thereafter, defendant saw the car's driver walking toward the donut shop and for the safety of the patrons, decided to confront him outside. He showed the driver his police identification and arrested him for aggravated assault with a shotgun. When the driver began walking away, the defendant tried to restrain him by tugging on his shirt. Having no success, the smaller defendant delivered two karate-like kicks to the driver's back. Still being unable to stop him, the defendant struck the driver on the side of his head with his service revolver.

The driver took off running toward the Dixie Liquor Store with the defendant in pursuit. The driver got there first and ran behind the bar. Upon entering the lounge, the defendant yelled to the bartender, asking

him if the driver worked there or belonged behind the bar, to which he received a negative answer. The defendant ran down to the end of the bar where he saw the driver rummaging behind the bar. Both the defendant and the driver testified they did not know a gun was behind the bar, though a handgun was found under some paper bags beneath the cash register, which was located in the center of the bar.

When the driver turned toward him, the defendant, believing he had a weapon, shot him three times. The defendant then put his foot on the driver's back, ordered the lounge doors locked, and stated other police officers were on their way.

Defendant's platoon commander and the investigating officers arrived shortly thereafter. They kept the defendant and his girlfriend apart and took their statements. They found the driver's car, which fit the description the defendant had given them, and which had the license number the defendant had written down. Also, some keys found lying beside the wounded driver fit this car. As a result of this evidence, the driver was arrested for aggravated assault with a shotgun. This charge was subsequently dropped as no shotgun was found, and the only item faintly resembling one was a bayonet found under the car seat.

The victim, who was the alleged car driver who followed the defendant, had a completely different story

of what happened leading up to his being shot by the defendant. Earlier that evening he had been at a friend's house working on her car. She testified he left her at 9:33 p.m., remembering the time from the car radio having stated it. He then drove to the Dixie Liquor Store where a friend bought him a beer. This was confirmed by three witnesses at the lounge. Deciding that he had inappropriately parked his car, he went outside to move it. After doing so, he was walking across the parking lot that is bordered by the Tastee Donut Shop, a Time Saver store, and the Dixie Liquor Store. It was there that he was confronted by the defendant. There is conflicting testimony as to whether the defendant identified himself as a police officer, with some of the state's witnesses saying he did, others saying he did not, and the victim saying he did not.

After having been confronted by the defendant and after having heard a racial slur from the defendant, the victim began walking back to the lounge. He was in agreement that the defendant's actions to restrain him were unsuccessful and that he finally ran back to the lounge once he had been struck by the defendant's service revolver. Once there, he sought to get behind the bar so that he could put the bartender between himself and the defendant. He denied rummaging for a gun behind the bar and stated he was shot three times by the defendant in the side and back, though he did not threaten the defendant in any manner.

The jury heard these two versions of what transpired. Besides the defendant, the defense called the girlfriend, the two investigating officers, and the defendant's New Orleans Police Department partner. The state primarily based its case upon the victim, two parking lot spectators and three persons in the lounge. After five total hours of deliberation, the jury returned a guilty verdict of attempted manslaughter.

Assignments of Error Numbers 6-10

Defendant contends the trial court erred in allowing the state to argue from facts outside the evidence and in failing to grant a new trial based upon improper prosecutorial arguments.

The scope of closing argument is limited to the evidence admitted, the lack of evidence, conclusions of fact drawn therefrom, and the law applicable to the case. C.Cr.P. art. 774.

Particularly unwanted are comments by the prosecutor referring to matters allegedly within his personal knowledge, but not in evidence. *State v. Kaufman*, 304 So.2d 300 (La. 1974). The reason for this prohibition is that such remarks attempt to add to or subtract from the actual evidence in the record through the influence of the prosecutor's official position. The jury may give greater weight to these observations than to the actual evidence and may, consequently, determine guilt or innocence on the basis of the prosecutor's opinion.

However, not every remark of this type will warrant reversal. C.Cr.P. art. 921. Before a verdict will be overturned on the basis of improper argument, this Court must be thoroughly convinced that the jury was influenced by the remarks and that they contributed to the verdict. *State v. Carthan*, 377 So.2d 308 (La. 1979); *State v. Heads*, 370 So.2d 564 (La. 1979).

If the prosecutor's argument is expressly or impliedly based upon the evidence, then no error is committed, and statements in closing arguments do not go outside of the evidence if the inference drawn from the evidence is not implausible. *State v. Lockett*, 332 So.2d 443 (La. 1976).

Generally, we find the prosecutor's statements in closing argument and in rebuttal closing argument are impliedly based upon the evidence and, even if they appear improper, we do not believe they clearly influenced the jury to the defendant's prejudice.

Specifically, we will address each complained of statement and briefly explain why we do not see it as improper or influential.

(1) During the state's closing argument:

> "You have police investigating a police shooting. This defendant works with them when they arrive on the scene there. Some other

> agency should be investigating the shooting. You can't really blame the police. They are going after. . . The first thing they are going to look for is to justify his actions."

The defense objected, and the judge overruled the objection. The state was arguing from the evidence, for the victim had been arrested and charged for aggravated assault with a shotgun when the investigating officers knew no shotgun was found. This does make the investigation look suspect and the state's comment about this was proper.

(2) During the state's closing argument:

> "As I've said, this has been a very informed trial. You have had more facts in front of you than almost any jury I have ever seen."

The defense objected, and the state withdrew the statement. The defense did not request an admonition. This comment could be implied from the fact that the jury had heard a three-day trial with a myriad of facts. Although the prosecutor's observation concerning his sightseeing experiences was improper, it was also innocuous and we fail to see how this comment could have influenced the jury to the defendant's prejudice.

(3) During the state's rebuttal closing argument:

> "What you have heard today is what every defense attorney does when he does not have a case and they can't justify what their client has done."

The defense objected, and the judge overruled the objection. This is another way of arguing that the defendant will resort to some smoke screen tactic to divert the jury's attention when he does not have a case. The prosecutor is permitted to argue the failure of the defense counsel to justify the defendant's actions. To the extent that the prosecutor's knowledge concerning what every defense counsel does was without foundation and outside the record, the same was irrelevant and harmless argument. We find the argument did not prejudice the defendant.

(4) During the state's rebuttal closing argument:

> "They are following him. Officer Bretz, why would they be following you. The defense says, I don't know. We can't give you a reason. He is a little paranoid. Someone is following him, but he doesn't know why. You sure as heck should know why somebody would be following you."

There was no defense objection made at the time this statement was made. Earlier, the defense had opened the door by referring to the prior incident in which the

defendant was involved while questioning Lieutenant Alberts, and eliciting the same testimony from the defendant. The trial judge later ruled neither side was to pursue this avenue, and the state had complied with this order by not cross-examining anyone as to the prior incident. This comment may simply be regarded as a permissible inference from the lack of evidence upholding the defendant's position.

(5) During the state's rebuttal closing argument:

> "There may be a reason why the lieutenant didn't want that particular man to go out and confront somebody. Maybe the lieutenant knew him."

The defense objected, and the judge sustained the objection. The defense did not request an admonition. This comment was made to refocus the jury's attention on the characteristics of the defendant as a person with a quick temper and foul demeanor as exhibited on cross-examination. This was not mere speculation, for the trial judge referred to the defendant's attitude while on the witness stand in his sentencing reasons. Therefore, the state's reference to the lieutenant's knowledge of the defendant's personality was a proper reference from the evidence, as the state was merely alluding to a fact which the jury could draw from their own observations.

(6) During the state's rebuttal closing argument:

> "This is just natural. We told you some of our witnesses would be inconsistent, because we were honest with you. We put on every bit of evidence that we had, not hiding anything."

The defense objected, and the judge overruled the objection.

(7) The state then continued:

> "There is no attempt to fool anybody here. There is not (sic) attempt to pull the wool over your eyes."

There was no defense objection made, as such would have been redundant. Both of these comments were provoked by the defense's closing argument where he speculated as to the state's presentation of its case. We regard the remarks of the prosecutor concerning the quality of his own case as proper rebuttal.

At the new trial hearing, the defense asserted that the state had another witness under subpoena whom it chose not to call; therefore, the above comments were misleading. The defense doesn't suggest this witness would have been favorable to his case, nor that the state failed to comply with his discovery motion. The state is not required to put on every subpoenaed wit-

ness, and the comments regarding its presentation of the case were proper.

(8) During the state's rebuttal closing argument:

> ". . . there is a tendency by the police to help other policemen who are in trouble."

The defense objected, and the objection was sustained.

(9) The state continued:

> "Well, there is always an excuse when a policeman uses excessive force. They always come up with something."

The defense did not object to this comment. These two statements were clearly implied from the evidence as the two investigating officers' actions at the crime scene made the state's comments justifiable. The officers questioned the seriously wounded victim without reading him his rights and while the paramedics were working on his wounds. Then, they arrested him and charged him with aggravated assault with a shotgun when no shotgun was found. The state's comments are a direct inference of this evidence brought out at the trial, and were proper.

We have briefly analyzed each complained of comment made by the state and find no reversible error,

whether viewing the comments singularly or as a whole. We find the state's comments were impliedly based upon the evidence and did not clearly influence the jury to the prejudice of the defendant.

For the above reasons, these assignments of error are without merit.

Assignments of Error Numbers 2 and 4

Defendant contends the trial court erred in allowing the prosecutor to cross-examine the defendant and the defense witness, Patricia Balderas, regarding their personal relationship vis-a-vis the defendant's marital status.

During cross-examination, the defendant was questioned about his romantic interest in the defense witness and, although reluctant to do so, he finally admitted a romantic relationship with the witness. After obtaining this admission, the prosecutor then obtained the further admission that the defendant was a married man, though not married to the witness. The defense objected, and the judge sustained the objection.

It was proper to show the defendant's relationship with the witness to reveal any possible bias. R.S. 15:492. However, it was not relevant to show that the admitted relationship existed at a time when the defendant was married to another, and the judge proper-

ly sustained this objection because of its lack of relevance.

Later, while the witness was testifying on cross-examination, the prosecutor elicited from her the fact of her romantic relationship with the defendant. Continuing the examination, and notwithstanding the fact that the judge had ruled inadmissible the fact of the defendant's marriage, the prosecutor proceeded to ask the witness if she knew the defendant was married.

Again, the defense objected and complained to the judge that the court had previously ruled the question inadmissible and, despite the ruling, the prosecutor had asked the same question again. The court maintained that it had not ruled that the question was improper, though the record clearly shows that he had. This time the court permitted the question on the ground that the evidence was already in the record, which was correct.

Nevertheless, the record clearly shows both witnesses had answered the questions regarding their relationship and the defendant's marital status before the defense objected. A contemporaneous objection is necessary to preserve the issue for appellate review. C.Cr.P. art. 841. An objection made after the evidence is before the jury comes too late. *State v. Foote*, 379 So.2d 1058 (La. 1980).

Even had the questions concerning defendant's marital status been properly objected to, this would still not have constituted reversible error as there has been no clear showing by the defendant that the jury was prejudiced by the questions.

These assignments of error are without merit.

Assignment of Error Number 5

Defendant contends the trial court erred in refusing to allow the defense the opportunity to introduce evidence of prior consistent statements made by the defendant and Patricia Balderas.

As stated in the factual resume hereinabove, the jury was faced with two very different stories as to what happened on the night of the shooting. To substantiate his allegation that the victim followed the defendant, the defendant sought to show that the defendant and Patricia Balderas made the identical statement about what happened before they were allowed to get together and collaborate on their stories. The defendant sought to accomplish this through the questioning of Sgt. McKenzie, the officer who investigated the shooting and who had taken the defendant's statement shortly after the shooting.

Sergeant McKenzie did testify as to his role in the investigation and the statement he took from the de-

fendant. Defense counsel then questioned him regarding the statement made by Patricia Balderas at the same time. The prosecutor objected to this testimony as hearsay. The defense attorney countered that the truth of the statement was not at issue but, rather, whether the defendant's statement and Patricia Balderas' statement were consistent.

The objection was argued out of the presence of the jury. The defense counsel stated that he planned to have the witness compare the two statements,as he had prepared the defendant's and read Patricia Balderas' earlier, and to say that they were consistent. The state objected to the witness being asked to draw such a conclusion, as he was not an expert. The trial court properly ruled that to ask Sgt. McKenzie whether the statements were substantially the same would be asking for a conclusion and would be improper.

A witness may not testify to any impression or opinion that he may have. R.S. 15:463. A qualified expert may give opinion testimony, R.S. 15:464. A witness may testify as to natural inferences from something he has observed. *State v. Taylor*, 347 So.2d 172 (La. 1977).

Sergeant McKenzie, who was not qualified as an expert, testified that he only took the defendant's statement and was merely present when Patricia Balderas' statement was taken. Moreover, he admitted he had not read the statements recently. Thus, even using the

natural inference exception of *Taylor*, this witness was not in a position to state a conclusion regarding the similarity of these statements.

The point of the defendant's argument was to let the jury know that the defendant and Patricia Balderas had made identical statements on the night of the incident. Sgt. McKenzie did testify that the defendant and Patricia Balderas did not talk to each other prior to giving their statements. This was drawn to the jury's attention during closing argument by the defense counsel.

It appears that the defendant's purpose was to place the contents of the statement before the jury; thus, the statement was properly excluded as hearsay. R.S. 15:434. There was no need for Sgt. McKenzie's conclusions as to the defendant's and Patricia Balderas' statements.

This assignment of error is without merit.

Assignment of Error Number 1

Defendant contends the trial court erred in refusing to allow cross-examination of the victim on the issue of whether he had prior confrontations with police officers.

When the victim first took the stand on direct examination, the state's attorney asked him if he had any

prior convictions. The victim responded that he had been convicted of simple battery five years earlier, but he had no other convictions before or after that.

During cross-examination of the victim, the defense counsel asked him if he had ever had a previous confrontation with a police officer. The state promptly objected to the question before it was answered, and the objection was sustained. The defense counsel then argued that he was attempting to show possible bias, but the court still sustained the objection.

The defendant's attempt to elicit this information from the victim was made to show the victim's bias toward the police. R.S. 15:492 does allow for impeaching the credibility of a witness by showing he is biased. However, the bias permitted to be exposed must be personal against the defendant, rather than general in nature. *State v. Robinson*, 337 So.2d 1168 (La. 1976); *State v. Darby*, 310 So.2d 547 (La. 1975).

In this case, the defendant's question could only show a general bias against the police, not one against this particular defendant. Both the defendant's and the victim's testimony reveals they did not know each other prior to the incident. Thus, it would be impossible to show the victim's personal bias against this unknown defendant.

Furthermore, the jury was made aware from the start of the victim's prior conviction for simple bat-

tery, so they knew he had had prior experience with the police. This was amplified by the defendant in closing argument, which the jury obviously considered.

This assignment of error is without merit.

Assignment of Error Number 4

Defendant contends the trial court erred in giving him an excessive sentence.

The trial court sentenced the defendant to three years at hard labor, when he had a potential maximum sentence of 10½ years. The defendant alleges three years is too long, as he was a "model citizen" with no previous record and as an ex-policeman, his life will be in jeopardy in Angola.

In pronouncing sentence, the trial judge stated that he took into consideration the severity of the victim's injuries, the defendant's attitude on the stand, and the fact that the defendant was a first-time offender. Thus, the trial judge properly used and stated the guidelines of C.Cr.P. art. 894.1 in determining the defendant's sentence.

In closing argument the defense counsel strongly argued that the defendant should not be held criminally liable for his acts; rather, if defendant is to be found at fault, it is that he was civilly liable, and since the victim has a pending $7 million lawsuit against the de-

fendant, that is satisfactory punishment. We disagree for, though using C.Cr.P. art. 894.1, the trial judge may consider restitution to the victim, we do not regard a pending civil lawsuit as restitution.

The trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by him should not be set aside as excessive in the absence of manifest abuse of his discretion. *State v. Sepulvado,* 367 So.2d 762 (La. 1979). We find no abuse in the trial judge's sentence to this defendant.

This assignment of error is without merit.

For the above reasons, the ten assignments of error made by the defendant are without merit, and the defendant's conviction and sentence are affirmed.

AFFIRMED.

DIXON, C. J., concurs.

DENNIS, J., dissents with reasons.

LEMMON, J., dissents.

DENNIS, Justice, dissenting.

I respectfully dissent.

The prosecuting attorneys, during their closing arguments, referred to evidence outside the record several times. To challenge the credibility of the police officers who testified for the defendant, an assistant district attorney argued:

> "You have police investigating a police shooting. This defendant works with them when they arrive on the scene there. Some other agency should be investigating the shooting. They are going after . . . . The first thing they are going to look for is to justify his actions."

To discredit the arguments of defense counsel a prosecuting attorney accused him of doing "what every defense lawyer does when he does not have a case and they can't justify what their clients have done. . . ." To magnify the weight of the prosecution's case an assistant district attorney told the jury that "you have had more facts in front of you than almost any jury I have ever seen." Defense counsel made timely objections to each of these statements. The trial court overruled his objections as to two of these objections and withheld ruling on the last statement after the prosecuting attorney said he would withdraw it.

A counsel's argument is in its purpose a connected presentation of the conclusions of fact supposed to have been proved by the evidence tending in favor of his client. He restates the evidence, and he reasons from the evidence. He is not a witness. Any presenta-

tion of fact, therefore, which is made by him in argument, must not be an assertion made upon his own credit; it must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of the notoriety as judicially noticed facts. To bring forward in argument an assertion of fact not of these two sorts is to become a witness; and to be a witness without being subjected to cross-examination is to violate the fundamental principle of the hearsay rule. 6 Wigmore, Evidence §1804 (Chadbourn rev. 1976).

This fundamental principle has been incorporated in our statutory law by La.C.Cr.P. art. 774, which provides that the argument of both prosecution and defense "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. The argument shall not appeal to prejudice. * * *"

When the argument of a district attorney goes beyond its proper scope, the defendant is entitled to have the trial judge admonish the jury to disregard the argument, if it might create prejudice against the defendant, or to have a mistrial ordered if an admonition is not sufficient to assure the defendant a fair trial. La. C.Cr.P. art. 771; art. 774 comment (c). If a defendant's timely and properly grounded objection to an improper argument is overruled, he may raise the ruling

on appeal, even though he failed to request an admonition or a mistrial. *State v. Hamilton*, 356 So 2d 1360 (La. 1978).

Nevertheless, a trial court's failure to sustain a defendant's objection to a prosecutor's argument not based on the evidence or matters which may be judicially noticed is not reversible error if it is apparent to the jury that it is expressly or impliedly only based on the evidence presented to the jury rather than on personal knowledge of facts outside the record, *State v. Hamilton, supra; State v. Kaufman*, 304 So.2d 300 (La. 1974), or if the improper argument did not create prejudice against the defendant or deprive him of a fair trial. La.C.Cr.P. art. 771.

Applying these precepts to the present case, I would conclude that the prosecuting attorneys' arguments were both prejudicial and obviously based on their knowledge of facts outside the record. The representation of facts made by them regarding typical police practices, customary tactics of desperate defense counsel, and the weight of the state's case, were assertions made on their own credit; they were not based on matters of fact of which evidence had been introduced or which may be judicially noticed. The assertion that policemen in general color their investigations and testimony to favor fellow officers suspected of crimes, in particular, presented a clear and substantial risk of creating prejudice against the defense and depriving the defendant of a fair trial. Such expressions by a pros-

ecutor are a form of unsworn, unchecked testimony adding to the probative force of the trial testimony the weight of the prosecutor's personal knowledge of police behavior. Cf. *State v. Kaufman, supra.* To a somewhat lesser extent, the same may be said of the prosecuting attorney's assertions as to the weight of the state's case in comparison with other cases within his experience and the typical desperation tactics of defense counsel. It is not necessary to consider whether either of these latter standing alone might create reversible prejudice against the defendant in the minds of the jury. It is evident that through all of the improper prosecution arguments discussed, and one other to which an objection was sustained,* that the prosecution succeeded in creating in the minds of the jury the impression that policemen are generally unreliable witnesses in prosecutions against fellow officers. These representations of fact, for which there was no evidence introduced, were extremely prejudicial since the testimony of Bretz's fellow officers corroborated his version of the altercation in several important respects. Therefore, the failure of the trial court to sustain the defendant's objections constituted reversible error.

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* "[T]here is a tendency by the police to help other policemen who are in trouble."

APPENDIX B

Art. 921. Matters not grounds for reversal

A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused.

Amended by Acts 1979, No. 86, §1.

Source: Former R.S. 15:557; Acts 1966, No. 310, §1.

Official Revision Comment

(a) This article retains the sacramental language of former R.S. 15:557 and omits only the unnecessary and cumbersome verbiage. This article sets forth the basic concept of appellate review and is the primary legislative mandate governing appeals. It continues the law contained in the source provision because it has worked extremely well in the past and there is much judicial interpretation of the source provision. The cases are too numerous and too dependent upon their own facts to be codified in an illustrative enumeration in this article.

(b) The Commentary to comparable Sec. 461 of the A.L.I. Code of Criminal Procedure

lists twenty-two states that have adopted the same basic principles.

(c) The "harmless error" provision of former R.S. 15:557 was originally drafted by a committee of the American Bar Association. The provision is very similar to Sec. 461 of the A.L.I. Code and Fed. Rule 52(a). A study of Louisiana jurisprudence shows that the provision has achieved its intended object. The general theory of the cases is illustrated by State v. Saia, 212 La. 868, 33 So.2d 665 (1947), in which the supreme court held that appeals are not granted merely to test the correctness of the trial judge's ruling, but only to rectify any injury caused thereby. In applying former R.S. 15:557, the supreme court has consistently held that in doubtful cases, the doubt as to the prejudicial effect of the trial judge's error is resolved in favor of the accused. When the trial irregularity obviously had no significant bearing upon the outcome, the supreme court has refused to reverse on a technicality. This is the spirit and effect of former R.S. 15:557. Similarly, the United States Supreme Court has stated that "if, when all is said and done, the court is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a

constitutional norm or a specific comment of Congress . . . ." Kotteakos v. United States, 328 U.S. 750, 764, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557, 1566 (1946). In essence, this is exactly what the Louisiana law accomplishes. The Louisiana Supreme Court has experienced very little difficulty in logically interpreting and applying the Louisiana provision. Although the federal "harmless error" rule is more concisely stated than Louisiana's rule, a revision of the Louisiana provision is not advisable, because it might then be argued that a change in the meaning was intended, which would cast doubt upon the Louisiana Supreme Court's decisions.